United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-4184

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-4184

B

P/S

SIDNEY BUCHMAN & JOSEPH BUCHMAN

PLAINTIFFS - APPELLANTS,

- against -

SECURITIES AND EXCHANGE COMMISSION

DEFENDANT - APPELLEE

BRIEF OF PLAINTIFFS

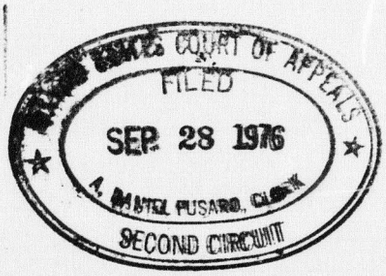

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EXHIBIT I - N.Y.S.E. LETTER OF JUNE 15, 1973

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Question For Review

Was the N.A.S.D. correct in its sanctions applied against Joseph Buchman and Sidney Buchman? Was the S.E.C. correct in modifying these sanctions without completely rescinding them?

Preliminary Statement

This is an appeal from a judgment rendered by the N.A.S.D. on June 28, 1974, appealed to the N.A.S.D. Board of Governers with decision rendered April 30, 1975, and appealed to the S.E.C. with decision rendered May 28, 1976. The S.E.C. neither granted our request for oral argument, nor did they inform us of their refusal to grant our request for oral argument, nor did they or the N.A.S.D. send us a notification of the decision, or a copy of the decision.

EXPLANATORY AS TO FORMAT FOR STATEMENT OF FACTS

The "Statement Of Facts" is divided into two parts, PART A and PART B. The reasons for this is that neither plaintiff has availed himself of the use of an attorney, both plaintiffs were not uniformly represented from the initial hearing in 1974 through the ensuing sequence of events which terminated with the S.E.C. hearing decision of May 28, 1976, and that both plaintiffs have separate defenses to present to the Court.

PART A

1. Complaint No. 1781 is not valid in regard to Shaskan's purchase of stock in the open market.

The complainant (Torpie) in Complaint No. 1781 asserts that Shaskan purchased shares of Crystalography after the termination of the trading suspension at a depressed price. Whether Shaskan bought or sold the stock and paid or received depressed or inflated prices is not a matter on which Torpie has a legal complaint - it is an internal matter of Shaskan. The position of Torpie was not altered by Shaskan in this transaction - Muir (agent for Torpie) was a fail to receive both prior to and after the execution of the formentioned transaction. The execution of the order was separate, distinct and autonomous from the fail on the books of Shaskan.

2. The NASD has acted with prejudice in the acceptance of the filing of Complaint No. 1781 by Torpie.

Prior to entering the hearings counsel for Shaskan stated to Sidney Buchman that the hearing would be similar to a kangaroo court. His foresight was overwhelming.

Conspiracy between Torpie, Muir and the NASD is evidenced in the complaint by Torpie naming John Muir & Co and no principals. All principals were named as were the organizations of all other respondents. The NASD stated that principals were named since some one had to make decisions. This would thus lead to the conclusion that at Muir decisions were not made, they merely occurred. The inconsistency exhibited here is another example of prejudicial conduct and muddled reasoning exemplefied at the administration of these proceedings.

3. Sidney Buchman could not provide the NASD with material elements to form the member's (Shaskan's) position. Document No. 28, page 9.

Sidney Buchman was at the hearing since he was named as an individual. This was made clear prior to the hearings - Sidney Buchman did not represent Shaskan. Prior to commencement of the hearings Torpie was piqued because there was no representative of Shaskan (other than counsel) at the hearings. It was agreed between Torpie, Counse for Shaskan, the NASD and Sidney Buchman that Sidney Buchman would answer what could be answered in reference to Shaskan, but that Sidney Buchman did not represent Shaskan. It was also stated that Sidney Buchman's knowledge on the matter at hand - refusal to honor contracts - was limited, as this was not his function at Shaskan. Further, Sidney Buchman's testimony

could not have stated that Meyer Buchman and Joseph Buchman were responsible for the decision not to honor contracts since at that point in time he did not have such knowledge. What was stated was that under operating procedure the decision would have been made by either (or both), but factually he did not know who had made the decision.

4. Sidney Buchman was first informed of the refusal policy after the fact. Document No. 28, page 11.

This is about the only fact the NASD perceived correctly. Sidney Buchman was not informed of this by the firm, but rather by another broker who called the trading department for some sort of an explanation. As neither I, nor Shaskan, traded (maintained a market) in the stock I was not aware of what he was talking about. In checking with the cage (stock received department), I was handed a copy of the letter, (Muir's Exhibit No.1), Document No.16. Sidney Buchman then called the broker and told him this was a cage matter and not a trading department function, and that he would have to speak with them. This by necessity took place after May 18, 1973, which will be discussed later.

Further Sidney Buchman was not called into a conference to discuss the need to purchase Crystalography shares on the open market. The decision to purchase had been made - not by Sidney Buchman as was made very clear at the NASD Board of Governors review. The only discussion pertained to what brokers Sidney Buchman would execute such orders with. The problem related to trading with brokers with whom Shaskan had fails in Crystalography. Where execution took place with such brokers it was agreed by both parties that acceptance of delivery on this new purchase would not change the policy of refusal on the old contracts. That is, the new executions were viewed as separate and distinct from the old contracts.

5. Sidney Buchman did not know on what grounds the refusal was made; and, in addition, knew only that this matter was in the hands of professional counsel.

The name of Torpie had no meaning to Sidney Buchman, as it was not on Shaskan's records. The question is how can Sidney Buchman assume responsability for something he had no decision in making, that was in the hands of counsel, and that the SEC consumed one month to furnish Shaskan an answer to. The SEC's policy of issuing directives without guidelines is apparent here. Furthermore, if what Shaskan through counsel requested of them was a simple matter for the layman to know what was required, why did their staff refuse to answer on the phone and then take one month to respond by letter? The answer is obvious.

6. The SEC and NASD are applying different standards in the application of justice.

Bartels and Zrike were exonerated on statements Sidney Buchman

made in reference to the refusal by the firm to honor contracts. It was stated that neither selling underwriting nor trading would have participated in such a decision - as was the case here. Factually, he could not state who made the decision; only, that under operating procedures where the decision could be made. He could not state as to what either Bartels or Zrike knew, or did not know, after the fact of refusal. Hence the NASD is penalizing Sidney Buchman without applying similar rules of conduct to others. Factually, they do not know what these gentlemen had knowledge of, for they never questioned them.

In addition, the separation of function and responsability by departments appears to have been recognized by the SEC in prior matters. In the Logos Case, Sidney Buchman was the only principal questioned. In the matter of liquidation, only the operating officer was interrogated by them.

7. Again Sidney Buchman is forced to restate that as head of the firm's trading department he did not participate in any decision pertaining to the refusal of purchase of stock. Document No. 36, Decision of the NASD Board of Governors, dated April 30, 1975, page 2.

The committee did not state that Sidney Buchman was responsible for the firm's refusal to accept delivery. In Document No. 28, page 11, the committee says, "Sidney Buchman, then was not involved in the formulation of Shaskan's refusal policy." The illogical statement, on page 2, by the Board is then a direct contradiction to the committee's findings. Further irrational reasoning is exhibited here by treating the refusal of delivery and the purchase of stock in the open market as one and the same. The purchase was autonmous from the fail to receive, resulting from the refusal, and did not change the status of the fail on the books of Shaskan. This was an independent transaction to facilitate the delivery of accounts as directed by the New York Stock Exchange.

8. The Board clearly states "... we do ackwowledge his (Sidney Buchman) ignorance of and non involvement in Shaskan's initial decision to refuse the delivery of the stock". Document No. 36, page 5

Hence in the Board's own words Sidney Buchman is innocent of the refusal policy adopted by Shaskan; and by extension, did not commit any violative acts nor pursue principles contrary to fair and equitable practice. This is true, for although the Board states "initial decision" there was only one decision. The decision to purchase Crystalography in the open market was not a refusal decision. The fail that resulted from the refusal was not negated in any manner by the purchase of stock in the open market.

9. The Board seems to feel that as head of the firm's trading

department Sidney Buchman should bear some responsability for violative acts.

Since the trading department did not maintain a market in Crystalography, why is the trading department manager penalized? Is there a penalty for being trading manager? Since the answer to this is negative, the Board is saying that Sidney Buchman is being penalized for executing an order in the open market. The Board did not state that Sidney Buchman was involved in the decision to purchase, but only that Sidney Buchman participatedin the purchase of Crystalography. As this was his job function and strictly an internal matter of Shaskan, the Board has unjustly penalized Sidney Buchman. The execution of the order is not a violative act. Furthermore, the execution of such order is not the basis for a valid complaint by the complainant, since this transaction had no bearing on his position.

10. The Board feels that Sidney Buchman should have encouraged the completion of open contracts.

No other principal has been cited for this - why Sidney Buchman? This was not a trading department function. The matter had been turned over to counsel and the SEC. As to ascertaining the validity of fraud, Sidney Buchman did not know on what grounds the refusal was made nor what the SEC required (nor did they at the time). Receipt of the letter from the SEC was not received by Shaskan until after the SEC took control of the firm. The letter from the SEC was not seen by Sidney Buchman at that time.

11. Reference is made to theBrief of Association in Opposition to Application for Review, Document No. 45. In this statement NASD counsel has misstated and distorted what is conclusive in the record.

Reference, page 5, footnote 9. Sidney Buchman never gave testimony in behalf of Shaskan. Sidney Buchman was at the hearings on behalf of Sidney Buchman and could not and did not give testimony on behalf of Shaskan. This is obviously a mistake of NASD counsel who cannot even get his statement of facts correct.

Reference page 15. Again Sidney Buchman reiterates he did not offer testimony in Shaskan's case, but only in his own behalf.

In addition on page 15 NASD counsel states that "Sidney Buchman's own testimony reflects that at the time the trades were rejected he was unaware of what basis (if any) existed for refusing to accept delivery of Crystalography and bore no internal responsability for trading practices." NASD counsel is apparently confused or simply refuses to face the facts, or deliberately distorts that which was evident. Obviously, as evidenced in the record, Sidney Buchman was unaware at the time that the trades were rejected, thus he would be unaware as to what basis existed for refusal. Simply stated, if Sidney Buchman is

unaware of the event, then by extension he must be unaware of the basis of the event.

In addition, NASD counsel further muddles matters by stating Sidney Buchman bore no internal responsability for trading practices. As trading manager Sidney Buchman bore internal responsability for trading practices. What was stated was Sidney Buchman bore no responsability for general operations, in which jurisdiction the refusal policy took place.

Reference, page 16. Again, Sidney Buchman could only testify as to what Sidney Buchman knew and not as to what Shaskan knew. The fact that Sidney Buchman was unaware of Shaskan's efforts does not mean that no efforts were taken; it only means that Sidney Buchman was unaware, since none of this would have involved the trading department. As previously stated Sidney Buchman did not represent Shaskan. Counsel is employing the same inane reasoning as the committee at the first hearing did. When Sidney Buchman stated he heard no rumor, this did not mean that no rumor existed but only that Sidney Buchman did not hear it.

Reference, page 17. In regard to Shaskan's efforts after receiving the SEC letter, Kraut's guidelines, at that point in time Shaskan was suspened and they were under the direction of the SEC. The honoring of broker's contracts was not paramount to the SEC.

Reference, page 21. Sidney Buchman did not testify in behalf of Shaskan. Again since NASD counsel repeats that Mr. Buchman was unaware of why the trades were refused, Sidney Buchman repeats he was unaware that the trades were refused at the time of refusal. Thus, it follows that if he is unaware of the refusal, he is unaware of why the trades were refused.

Reference, page 23. Again, NASD counsel's assumption that if Sidney Buchman did not know of what efforts Shaskan undertook to investigate their suspicions, there were none, is erroneous. Sidney Buchman did not testify for Shaskan and stated that his knowledge about the refusal was limited and after the fact.Counsel, after distorting and mistating the facts, then states, " Mr. (Sidney) Buchman's testimony in this regard can best be characterized as evasive and indicates that no good faith efforts were made on the part of Shaskan or any of its principals to determine whether a manipulation was involved." As for evasiveness, Sidney Buchman could only testify as to what he knew and none of this was on behalf of Shaskan. The only reason he was at the hearing was because he was named individually. He could not testify as to what Shaskan or other principals did.

Again it is repeated that when Mr. Kraut's letter arrived the firm was under the direction of the SEC.

Reference, page 21. NASD counsel has finally stated something factually, although by innuendo they attempt to distort the truth. " Mr. Buchman also claimed that he had no part of the decision to refuse to complete the trades." Sidney Buchman asserted that he was not a participant in the refusal and no contrary evidence has been introduced. Not only has this not been contradicted in the record, but testimony confirming his non participation has been given by Joseph Buchman. As stated on Page 21 Sidney Buchman's entire knowledge of the affair came at subsequent discussions with Joseph Buchman and

Meyer Buchman after receiving the complaints.

12. Sidney Buchman was denied due process. Reference, SEC Findings File No. 3-4684.

Sidney Buchman's request for a hearing and/or review was not formulated on the fact that the fine was excessive, since any fine would be deemed excessive. Document No. 47 states that oral arguement was not requested (Footnote 1). A hearing was definitely asked for. The SEC is also confused as to appearances: if Joseph Buchman and Meyer Buchman appeared, then Sidney Buchman appeared since he signed the very same documents as they did. Furthermore, Sidney Buchman believes he was denied due process. as he was never informed that a hearing had been denied nor given an opportunity to present an adequate defense in writing. In addition, when the SEC reached their decision they never informed him of their findings. Their actions were entirely unilateral and as such denied him due process.

13. Sidney Buchman did not know of the refusal until after May 18, 1973.

He disputes the fact that the SEC has stated that he was aware of Shaskan's failure to accept delivery from at least May 18, 1973. This conclusion is erroneous and is not corroborated by the record. The earliest he could have known of the refusal would have been May 18, 1973, since as stated previously, he was informed after the fact - when delivery had been turned down. The exact date cannot be stated with certainty by him, but it was definitely after May 18, 1973, as Shaskan first had to turn down delivery prior to my being informed by the broker turned down.

14. The SEC is applying their findings on a superficial basis and without foundation as no violative act was committed by Sidney Buchman.

In regard to his position in the firm, vice president and director, is he being penalized for this? If so, no other defendant has been and therefore the SEC is applying the law unequally. His job function at Shaskan was trading manager. Ther is no violative act in that. Crystalography stock was not traded by him or the firm. Delivery and receiving were not in the jurisdiction of the trading department. When an order originated in the cage (back office), standard operating procedure at Shaskan was for the trading department to execute it. The trading department did not govern the cage.

What is the relationship between function and responsability? He performed his function in the execution of the open market transaction in Crystalography. His responsability was to obtain the best execution at the time, which he believes was performed. As for resolving the

problems of uncompleted transactions, this was not a trading department responsability and entirely out of his realm of accountability. Probably, the problems arising from uncompleted transactions could have been resolved if the SEC had not delayed in responding to Shaskan's request. Shaskan's request was simple - tell us what you require and we will do it. The matter was in the hands of legal counsel and the SEC. Obviously, the procrastination by the SEC demonstrates that no thought had been given as to what was required to satisfy their directive. The matter was not simple, but complex, and necessitated approximately one month to formulate their policy. Since both counsel and the SEC did not know what was required, why is it assumed that Sidney Buchman should have this knowledge to resolve the problem. In addition, why is it assumed that only Sidney Buchman and not any other officer or director was responsible for this? There is nothing in the record that shows he influenced or participated in any back office decisions or policy. In reality, back office directives were mandates for the trading department.

15. In the matter of public interest it is requested that the court direct the SEC to state for public knowledge what they have acquiesed to in accepting the NASD ruling in regard to responsability emanating from confirmation.

The SEC requires that upon execution of a transaction immediate confirmation be sent to the principal. The participants in the securities markets have accepted such confirmation as a contract. If on the sell side, as in the case at hand, the seller makes good delivery by settlement time he expects to receive payment for such delivery. Prior to the NASD decision the public has been led to believe and accept this as gospel.

This new policy of the NASD, unannounced, vividly proclaims the opposite of this. The seller is not paid unless his broker consummates delivery to the buyer. This is not stated on the confirmation or to the seller, but it is accepted by the NASD as unstated policy of the selling broker. In effect the confirmation is negated, and from the sellers point of view valueless.

Sidney Buchman is not debating the correctness of this decision, at present this is not his concern. It is petitioned that if such policy is the rule of administration then those that operate in the securities markets be made cognizant of this through formal communique. To date no recognition has been given to this subject.

STATEMENT OF FACTS

PART B SECTION I, N.A.S.D. DECISION OF JUNE 28, 1974

PAGE 4

John Muir's statement: "Once liquidation had commenced, further attempts to consumate the transaction were to no avail, even though Shaskan was honoring contracts in securities other than Crystalography. This statement is a blatant outright lie, but the answer made no comment or response to this statement, which means the Conduct Committee accepted this as fact.

June 19, 1973, Shaskan was suspended by N.C.C. and the following morning, June 20, 1973, by the N.Y.S.E. On the morning of June 20, 1973, Shaskan was forced by the N.C.C. suspension to stop honoring contracts with all brokers. From June 20, 1973 until the present, Shaskan has not honored or completed any open contracts with other brokers. This decision was besed on advice given by the S.E.C., whose authority we have been under since June 20, 1973. This can all be evidenced by our records and the S.E.C. records. Since June 20, 1973, all contracts have been bought in or sold out, or remain on our books as either fails to receive or fails to deliver.

PAGE 7

As stated in the last paragraph of Page 7, any N.A.S.D. rule violations which might have occurred could not have arisen until after May 18, 1973.

PAGE 8, Paragraph 2:

Our failure to complete contracts on Crystalography had good justification and did not involve any deliquency in observing high standards of commercial honor and just and equitable principles of trade. Shaskan's policy in handling these trades was entirely proper and definitely did not involve any dishonorable or unethical conduct. I honestly believed, and had good reasonable basis to believe, that to consummate the transaction would further a fraudulent scheme.

PAGE 8 and 9 - Last paragraph of Page 8 and top of Page 9

Joseph Buchman obviously believed these transactions were part of a manipulative scheme, or I would not have authorized a letter to the S.E.C. for a clarification on the matter. Shaskan could not argue about what it believed about the parties involved in this manipulative scheme, as it did not have enough time or sufficient funds to back up its beliefs because of extenuating circumstances. Shaskan refused delivery, or to deliver on Crystalography Trades, was not just a matter of policy during the subject period, but was based on the stock's suspension, the S.E.C. release on the possibility of fraudulent trades, and my strong belief that a manipulative scheme was involved. The inference that we saw nothing wrong with the Torpie transactions in particular is pure nonsense, as we did not know any trades with Torpie. Why should Sidney Buchman hear rumors pertaining and implicating Torpie, Muir, or Contemporary in alleged manipulative schemes, as we were only clearing agents for Pohs, Levy, & Co., and its customers on these trades - we did not execute any of these trades. The N.A.S.D. is strongly implying that N.A.S.D. traders commonly spread rumors among themselves, which in itself is dishonorable and unethical conduct and a breach of N.A.S.D. rules. The N.A.S.D. is forcefully trying to imply that because Sidney Buchman did not hear any rumors on an alleged manipulative scheme, it did not exist?

This whole statement by the N.A.S.D. is purely supposition and contrary to its own rules and regulations. Furthermore, it was a policy of Shaskan not to trade with Torpie or Contemporary, unless absolutely necessary; or many of the other brokers involved in Crystalography - so how could Sidney Buchman hear any rumors from so called reputable N.A.S.D traders.

Shaskan did not request data from Muir or any of the other parties involved as it was ordered and directed by the N.Y.S.E., S.E.C., and Federal Court Injunction, to expend all its energies and funds on clearing up customer claims and accounts as rapidly as possible. We received an S.E.C. reply of June 19, 1973, and from that day forth, we were not in control of our destiny, but under the powers of higher authorities who dictated what our priorities should be and how our funds were to be used. All the above can be substantiated by the N.Y.S.E. and the S.E.C. Up to June 19, 1973, and after, all decisions on Crystalography were solely in the hands of Joseph Buchman, and did not involve any other corporate officers or directors. The N.A.S.D. delay in having a hearing 10 months after the inception of the complaints is the reason why Joseph Buchman could not attend the original hearing, and as he had sole authority for all decisions made, as he was

chief operation officer of Shaskan; the N.A.S.D. was plainly not cognizant of all the material elements involved. Thus, the N.A.S.D. original decision was based on conjecture, untrue evidence, and lack of total fact.

PAGE 9, Paragraph 3:

The N.A.S.D. statements made here are pure hogwash and based on suppositon and prognostication. We acted affirmatively and quickly to establish whether there was reasonable grounds for continuing to deliver or accept delivery. The N.A.S.D. has no authority to say what is sufficient in order to justify a suspension of a contractual obligation when possible fraud and manipulation might be present according to a release by the S.E.C., the senior organization in authority. Only the S.E.C. can say and make a decision under these circumstances. My decision, as chief operating officer, was that no discussions were to be made with any of the parties concerned, before a clarification by the S.E.C. on what a broker had to do to satisfy himself that completion of the transactions would not further involve him in the strongly suspected scheme of manipulation and fraud. The release by the S.E.C. was a glaring warning signal that they strongly suspect fraud and manipulation with respect to Crystalography. The statement concerning a telephone call to the Commission is a supposition by the N.A.S.D., and certainly would not have led to a quicker course of action.

A telephone call to the Commission preceded the letter and the reply was to send a letter in order to get a clarification. The N.A.S.D. is making a strong implication, totally devoid of the facts and based on pure speculation that Shaskan was stalling; this derived implication is totally false. Shaskan did not act because it was not permitted to act after June 19, 1973, as we were no longer in control of our lot.

PAGE 9, Last paragraph:

Joseph Buchman authorized the purchase of shares in the open market pursuant to the N.Y.S.E. directive that all customer accounts be cleared up as rapidly as possible. As Shaskan was not delivering or receiving Crystalography stock, at that time, and still waiting for a clarification from the S.E.C., I decided to buy in clean stock to deliver to Pohs Levy's customers. Joseph Buchman did not use what he believed to be tainted stock which we had in house and which we still have. It is not cut and clear that some of these transactions were

those from which the committments to Muir and Contemperary had been made. Those trades could have been made for the Pohs Levy trading or investment accounts and not necessarily customers. Again, an outright statement was made on conjecture without the total facts involved. We did not manifest an overt negation of our obligations to broker - dealers with whom we had committments, everything was done in orderly manner and had a reasonable basis. Again, let me make it perfectly clear that purchases of stock to clear my customers accounts was autonomous from those previous suspect trades. We have not negated or denied these trades, all trades are still carried as fails to receive and fails to deliver on our books. These records can be substantiated by our records and those of the S.E.C. The S.E.C. had no objection to Joseph Buchman to handling of this matter in the above-mentioned manner.

PAGE 10, Paragraph 1, 2, and 3:

Shaskan's completion of customer transactions of Pohs Levy in Crystalography was done at the insistance of the N.Y.S.E. ; not by its own volition. If Joseph Buchman had a choice, they would not have been completed then or now.

Completing these transactions does not imply that we had no reason to suspect fraudulent activities on the part of their customers. On the contrary, the list of the customers of Pohs Levy, particularly one Mr. Ron Martini, mentioned in the newspapers and the S.E.C. reply letter of June 19, 1973, leads to strong suspicions of fraudulent activities. Secondly, the dismissal by Pohs Levy of the Registered Representative, Vincent Conchessi, and the Over-the-Counter Trader, and Partner, Vincent Tarranto, who executed the trades, clearly suggests that fraud, manipulation, and definite irregularities occurred.

PAGE 10, Paragraph 4:

Joseph Buchman acted properly in this matter and used due diligence, S.E.C. releases, and fact to establish a proper cause of action including not accepting delivery or making delivery. Joseph Buchman acted with justification and with reasonable basis os fact. Joseph Buchman acted in a manner consistent with just and equitable principles and did not violate Article III, Section 1 of the Rules of Fair Practice of the Association. The N.A.S.D. decision was based on conjecture and incomplete facts. The N.A.S.D. statement that "such reliance is poorly grounded in law" is meaningless and

inconsequential as they are neither lawyers nor judges, and as they previously stated "the Association will not engage in deciding the legal rights of parties in a contractual dispute". Obviously, because they are not qualified to make such a profound decision.

PAGE 10, Paragraph 5:

The matter of Crystalography did not reach the point where it would be discussed at a Board Meeting, up to June 19, 1973, the operating policy for handling the transactions was solely made by Joseph Buchman. It had not reached the level "of overall operations and business policy" because, Joseph Buchman was awaiting the forthcoming clarification from the S.E.C. Consequently, neither Sidney Buchman nor any other officer had any responsibility for operating decisions concerning Crystalography prior to June 19, 1973.

How could Joseph Buchman show evidence of good faith attempts to foster the satisfactory completion of the subject transactions when Joseph Buchman could not have acted on them till June 20, 1073, and we were suspended June 19, 1973 by the N.C.C., and June 20, 1973 by the N.Y.S.E.

PAGE 11, Paragraph 1

Sidney Buchman was called into conference with Joseph Buchman to discuss the best manner of handling the purchase of Crystalography stock for customers, as Joseph Buchman had already decided not to use stock in house as it might be tainted.

Joseph Buchman wanted to rely on the profound knowledge of Sidney Buchman as to what firms to deal with. Sidney Buchman was not called into conference to give his opinion on the completion of open contracts, nor to determine if fraud existed, because at that time, we still did not have the S.E.C. response; nor to determine if fraud existed in the Torpie transactions as Shaskan did not have any trades with Torpie.

Sidney Buchman had responsibility for the Over-the-Counter Department of Shaskan, not the operations of the firm, nor the handling of clearing problems. I emphatically reiterate that Sidney Buchman was solely called into conference for his knowledge of trading, the Over-the-Counter market, and what brokers it was safe to do business with, and for no other reasons,

PAGE 11, Paragraph 3:

Sidney Buchman denies he committed violations of Article III, Section 1 of the Association Rules and that his conduct was inconsistent with just and equitable principles of trade. This is based upon S.E.C. Release No. 34-7463 in the N.A.S.D. Manual Rules of Fair Practice - Page 2151 ·41 "Breach of Stock Purchase Contract - The refusal by an N.A.S.D. member to consummate a stock purchase contract with another member upon the good faith belief that the transaction was just of manipulative and fraudulent scheme did not constitute unethical or dishonorable conduct in violation of Section 1, Article III. Mere failure to perform a contract is not necessarily unethical, dishonorable, or without equitable excuse or justification. The member refused to complete the transaction after it learned with reasonable basis that transactions in the stock were under investigation by the S.E.C., one of the direct buyers refused to pay a draft, and another buyer turned out to be non-existent. Southern Brokerage Co., Inc., S.E.C. Release No. 34-7463(S.E.C.).

As both Sidney Buchman and Joseph Buchman had both justification, and equitable excuses, we could not have violated Section I, Article III. At the point reached in Crystalography, only Joseph Buchman made the decisions and had the responsibility, so is there is any guilt, he alone should hear the onus.

To summarize the whole situation, I must emphasize the following points as they are of utmost importance:

1) What methods or procedures did John Muir or Torpie & Saltzman use to satisfy themselves that they were not involved in fraud or manipulation?

2) Nothing was mentioned or determined as to whether Muir or Torpie & Saltzman are suspect in the present Crystalography Investigation.

3) The N.A.S.D. is upholding Muir for a policy of not paying a customer in an agency transaction unless they can deliver and be paid, this is against normal business procedure as a customer is paid upon good delivery. This policy of Muir's, is not stated in advance to brokers whom they execute for or to brokers whom they execute with. This leaves a strong suspicion in my mind that the possibility of collusion between the two firms lingers strongly and should be investigated.

4) Torpie said that their trader who handled the stock left because he could not make a living, who was he? Why was

he not present at the hearing? This man was of key importance and should have been thoroughly interrogated on Crystalography.

5) Torpie stated that they picked up Crystalography as a number and that they never heard of Provident Securities, this is difficult to believe that a Trading house like Torpie never heard of Provident Securities. Did Torpie have a due diligence file on Crystalography before they started trading this number, if they did, they surely would have been familiar with Provident.

6) Torpie stated he dropped the stock because he did not like the association with the brokers in it, this is an outright lie because it was the same brokers who originally traded it. Or maybe they never did nay diligence until after they started trading a number.

7) Joseph Buchman opinion is that Torpie did not go into the trading of Crystalography as a number, because they were not needed in the stock as 12 houses were already trading it. I believe Torpie went into Crystalography because they had a ready source of supply to feed out stock. Furthermore, a detailed list of all trades done by Torpie in Crystalography is of utmost importance and is significant evidence. Their trading is this issue is prima-facie evidence.

8) Joseph Buchman believes that Torpie is not such a clean brokerage house in this matter or in other matters of a similar nature as evidenced by the fact, that on June 25, 1974, Torpie & Saltzman, two of its principals James V. Torpie and David I. Saltzman, and a former trader, Harvey H. Geller, were named as respondents by the S.E.C. Division of Enforcement, in the unsuccessful offering of Sacom Stock on October 31, 1872. They were charged with the following:

A. Violation of Federal Security Laws

B. Torpie was charged with manipulative practices, as they were market makers and they participated in guaranteed trading arrangements.

This is very similar to the Crystalography situation and occurred less that a month after the questionable Crystalography trades of October, 1972. Nobody has yet disproven that Torpie was not part of manipulative practices concerning Crystalography.

SECTION II

SECURITIES EXCHANGE ACT OF 1934

REL. NO. 12492 May 28, 1976

ADMIN. PROG. FILE NO. 3-4684

PART B

PAGE 3, Paragraph 1:

Shaskan did not telephone a member of the S.E.C. staff requesting a clarification of the May 17, 1973, S.E.C. Release concerning Crystalography. Joseph Buchman immediately, acting upon knowledge of the S.E.C. Release of May 17, 1973, contacted his attorney in order to determine the appropriate course of action to be followed. The attorney's opinion was that the best course of action was to seek guidelines as to what a broker should do in order to satisfy himself that consummations of trades in Crystalography would not involve violations of the federal securities laws. Thus, the attorney promptly telephoned a member of the S.E.C. Staff and he was advised to send a letter in order to receive the data requested. The statement, "None of these inquiries was made, either before receipt of the staff letter or thereafter"., is ridiculously incongruous in relation to the situation that existed at that time. It is impossible to perform something, before one has knowledge of what one is to perform. Secondly, Shaskan did not receive or have knowledge of the June 19, 1973 S.E.C. Staff response until June 20, 1973; as the reply was sent directly to the attorney. Thirdly, subsequently to June 20, 1973, because of our suspension on the forenoon of June 20, 1973, by the New York Stock Exchange; we automatically came under the direct control and supervision of the Security Exchange Commission. The Commission, from that time forth, has been in the driver's seat and controlled our actions and priorities until it was formalized by the Federal Court Injunction of July, 1973.

PAGE 3, Paragraph 2:

Is a complete misconception of the actual situation and contains untruths.

The last sentence is a depreciatory allusion and

meaningless in respect to the points in question, especially when it emanates from supposedly knowledgeable individuals.

Shaskan, at the time the Crystalography trading suspension was lifted, was not in the process of delivering its accounts to another clearing broker under supervision of the New York Stock Exchange because of its impaired capital positions. In January , 1973, Shaskan decided to give up clearing customer accounts. Consequently, as a direct result of the decision, in February, 1973, Shaskan signed a clearing agreement with Ernst & Co,. a member of the New York Stock Exchange. This decision was not made then because of an impaired capital position, but because we were not large enough to computerize. By the time the Crystalography trading suspension was lifted on May 17, 1973, all of Shaskan's active accounts had been delivered to Ernst & Co., in accordance with the clearing agreement.

In early June 1973, the staff of the exchange did not order or direct Shaskan to clear up its fails with respect to oustomers transactions. At a meeting on June 8, 1973, between Joseph Buchman and the New York Stock Exchange, confirmed by a letter on June 15, 1973, Shaskan was ordered to effect prompt delivery of remaining inactive customer accounts and to have this accomplished by June 22, 1973. (Reference to New York Stock Exchange letter of June 15, 1973),

As a result of this directive by the New York Stock Exchange and not as yet having a reply from the S.E.C. Staff, Joseph Buchman decided to buy untainted stock in the open market in order to comply with the directive. Stock would not have been purchased without a mandatory directive stating a date for completion. It was not necessary to purchase stock in order to deliver out inactive customer accounts, as we had enough Crystalography on hand to effect delivery, and we still do.

Joseph Buchman decision to purchase stock in the open market, was made because he did not want to use "tainted stock" and because he had not at that time received a reply from the SEC staff. Joseph Buchman would not have spent money unnecessarily especially during a period when Shaskan needed and was directed to maintain a net capital of $200,000. Joseph Buchman felt the added expense was justified and that it was the best policy to adhere to based on his limited knowledge at that time. At the time, it was an operational problem which had to be handled immediately under the circumstances involved. Joseph Buchman had two choices (1) Delivered out what he strongly believed to be "tainted stock" already held in the house or (2) to buy clean stock on the open market - he elected the latter. It was purely an operational decision at the time and Joseph Buchman feels it should have no bearing on relevance on the case in question.

The last sentence "It made no inquiries to determine whether these open market purchases were part of a manipulative scheme.".This statement should have no import on this case and is meaningless when you analyze it in relation to the history of Crystalography, the circumstances Shaskan was under, in general to the normal market functioning, and the duties of the Security Exchange Commission. On June 9, 1973, the Crystalography trades were still tainted and awaiting staff clarification. The directive we were placed under, did not allow Joseph Buchman to make investigations; he had to act promptly and he did. When a broker makes a purchase in the open market under normal circumstances, he does not inquire beforehand to determine if his purchase is part of a manipulative scheme. As the S.E.C., after a seven month investigation, had permitted the resumption of open market trading in the face of their own glaring warning signal; Joseph Buchman decided, under pressure by the New York Stock Exchange, that the best alternative was to purchase presumed clean stock in the open market. If the S.E.C. felt that the resumption of open market trading in Crystalography was part of a new manipulative scheme or part of an old manipulative scheme, it had no right to permit the resumption of trading, for then it would be abetting manipulation and violations of the Federal Security Laws under which it exists.

No broker can function under the conception that everytime he executes an order for a customer or himself he may be part of a manipulative scheme. This statement is without significance has no meaning in the market place, has no practicality in the market, is not feasibly possible, and an attempt by the S.E.C. to pass off its duties to the broker. Shaskan did not remove any fails to receive or deliver from its books as a result of these opwn market purchases. At present, they are still good fails to receive and deliver on our books, and will be dealt with when we get to that level of our liquidation.

PAGE 4, Last 2 paragraphs, PAGE 5, 1st paragraph:

Joseph Buchman had equitable excuse and justification for failure to complete a contract. My belief was honest and reasonable at the time of refusal, consequently, the N.A.S.D.'s rule was not violated. We relied on the S.E.C.'s releases and the "Southern Brokerage Case", in that we had enough factual basis not to complete transactions in Crystalography. Our factual basis has been aforementioned in the response to the N.A.S.D. allegations.Also I might add, that Vincent Conchessi, the Pohs Levy registered representative with the firm only one week, whose accounts Crystalography was purchased for; was summoned by the S.E.C. staff investigating the Crystalography manipulation. The testimony given by him has not been made

available to Joseph Buchman. At the time, Mr. Conchessi was to talk with the S.E.C. staff, it was strongly rumored at Pohs Levy, that Mr. Conchessi was under the threat of physical harm if he testified. Lastly, we do not know these reason for the dismissal of Vincent Conchessi, in Pohs, Levy & Co., but Joseph Buchman ardently felt then, and still does; that the dismissal was founded on his part in the Crystalography affair.

The aforementioned and the above should leave no doubt in anyone's mind that inquiries were definitely made between October 1972 and May, 1973, in order not only to resolve any suspicions we had, not "may have had", but to sustain our posture in this situation. In May 1973, when the suspension on trading was lifted, Joseph Buchman did not just contend himself with a request to the staff for guidance. As Joseph Buchman had never done this kind of investigative work before and as it was done in the normal course of my job or business function, I sought legal advice and relied on it in launching any endeavor to try and resolve what I suspected at that point. In order to comply with a warning, one must know not only what one is looking for, but what is necessary in order to make a just and equitable decision. Logically, who could give better guidance to complying with an S.E.C. Release, then the S.E.C. staff itself? Thus, counsel was requested and after a while received.

We are being penalized for acting with prudence and discretion. When you travel on a new and strange path, you do not leap ahead, you proceed with caution until you are familiar with what lies ahead. In this situation advice was definitely needed by the S.E.C., and had to be the stepping stone to any investigation procedure on the part of Joseph Buchman. Suggestions contained in the staff's written response were not followed for two reasons (1) length in time of response, over one month, and (2)being under S.E.C. control when we received the response we had to direct our energies into the avenues directed to.

PAGE 5, Paragraph 2, footnote 13:

Sidney Buchman and Joseph Buchman were not novices in the securities business, but in this situation, they were definitely greenhorns. Joseph Buchman, whose total responsibility this situation was, had never handled this type of predicament before. Joseph Buchman did not know what to look for, what the S.E.C. required under the circumstances, nor what would he necessary to establish that Shaskan would be free from guilt if it completed these tainted trades. The Crystalography affair was an extraordinary occurrence, one in which

Joseph Buchman had no prior experience, and one in which we were the clearing member, in a relatively new area of operations for us.

Joseph Buchman's years in the securities business gave him no insight on how to handle this rare occurrence; thus he would definitely be a novice in the situation. None of the measure's set forth in the staff's letter were evident to Joseph Buchman, and that is why he sought counsel. Counsel could not give adequate direction, thus guidance was requested from the S.E.C. If measures to be taken were so self evident, why was the S.E.C. unable to immediately give guidelines on the telephone? Why did it take the experienced S.E.C. over one month to present guidelines in writing. It is obvious that everyone, including the S.E.C. were novices in this circumstance. This is not unusual, as it was an uncommon event in the securities business.

PAGE 5, Paragraph 2, footnote 14:

Joseph Buchman was not aware of what guidance was necessary, if any until the S.E.C. release of May 18, 1973, lifting the trading ban and giving a glaring warning signal to brokers involved. As the N.A.S.D. stated, no violation occured prior to May 18, 1973, as it was common street practice not to clear trades while a stock was under suspension by the S.E.C. Muir followed this practice by not delivering prior to May 18, 1973. Why prior to May 18, 1973, did Muir have no reason to believe that Shaskan would ultimately be called upon to consummate trades? - This is a pure assumption on the part of the S.E.C. Actually, we believed then and we believe now, that collusion existed between Muir and Torpie. This is evidenced by the fact that charges were brought against all firms involved including officers, but against Muir only charges brought were against the firm. How could Torpie and Muir comply so rapidly with the S.E.C. release of May 18, 1973 and effect immediate delivery. Obviously, they never diligently attempted to comply with the release. Their only interest were to settle trades as rapidly as possible. No inquiries were ever made to Shaskan, by either Muir or Torpie, to determine if we were involved. So how could Muir or Torpie have complied with the S.E.C. release or fully satisfied themselves that they were not involved? Clearly, they were just interested in settling trades as rapidly as possible, with no regard for the S.E.C. release whatsoever.

PAGE 5, Paragraph 2, footnote 15:

The statement "When Shaskan was directed by the New York Stock Exchange to clear up its fails in early June 1973, it chose to purchase Crystalography shares in the open market for delivery to customers rather than accepting the delivery of stock from complainants;", is totally untrue. The N.Y.S.E. directed us only to effect prompt delivery of remaining inactive customer accounts; it did not direct us to clear up any fails. Joseph Buchman chose to expend funds and purchase in the open market, in order not to use tainted stock to effect delivery to customers. Completion of open fails or purchases in the open market were not necessary; as we had sufficient stock in house, and we still do, to complete these customer transactions. The Exchange's staff did not specifically direct Shaskan how to clear up its fails, because it did not order Shaskan to clear up its fails. The Exchange's staff did not direct Shaskan where to acquire the Crystalography stock which it was required to deliver to customers, because Shaskan already had enough on hand to effect delivery. This can all be evidenced by Shaskan EXHIBIT I, letter from N.Y.S.E., dated June 15, confirming meeting of June 8, 1973 at which Shaskan was directed to do specific things.

PAGE 5, Paragraph 2, Footnote 16

When the S.E.C. permitted the resumption of open market trading in Crystalography, in May 1973, it is assumed that trading would not abet in the furtherance of a manipulative scheme. It is the function of the S.E.C. to prevent manipulative schemes and not to compound them. If the S.E.C. had any doubt concerning whether or not the resumption of open market trading would add to the suspected manipulative scheme, then it had no right to permit the renewal of trading in Crystalography. It was not the function of Shaskan to ascertain if trading was a compounding of a manipulative scheme, it was the duty of the S.E.C. The commencing of trading by the S.E.C., in a stock that has been suspended, usually implies that the S.E.C., is reasonably sure that new open market transaction would not be in any furtherance of any suspect violations of law.

The S.E.C. does not believe that the federal district court order issued in July 10, 1973, which required Shaskan's self-liquidation, precluded Shaskan from following the suggestions enumerated in the S.E.C. staff response. This is strong evidence that Shaskan had every right to await the forthcoming S.E.C. guidelines. Furthermore, we were under S.E.C. supervision since our suspension by the N.Y.S.E.

on June 20, 1973, as evidenced by Shaskan EXIBIT II, letter of June 22, 1973 to Joseph Buchman from the S.E.C. The self-liquidation of Shaskan has been handled under the supervision and auspices of the S.E.C. from the beginning. Priorities were set by the S.E.C. and adhered to by Shaskan. Top priority was to expend all energies and funds to clearing up all customer accounts and claims. Costs were specifically discussed with the S.E.C. and we were denied all unecessary or extraordinary expenses that did not relate to the completion of clearing up all customer accounts and claims. We were even rejected in our request to expend funds for attorneys and accountants. Although Joseph Buchman felt the rejection was unfair and ungrounded, he abided by the S.E.C. statement of policy, as he was under their jurisdiction. The question of acting on S.E.C. staff guidelines, issued June 19, 1973, became moot in retrospect, because of the ensuing events which transpired since June 20, 1973, and because we have not reached that point in our liquidation, where we would to be able to settle open fails to receive or fails to deliver.

PAGE 6, Paragraph 2, footnote 18 :

Joseph Buchman feels it is very necessary to reach the issue as to whether the 300 share transaction was in fact part of a fraudulent scheme. Joseph Buchman took all reasonable measures under the circumstances involved and had sufficient evidence to be convinced that the trade was tainted with fraud. The grounds for this conclusion can be easily ascertained from all of the above-mentioned. Joseph Buchman is being cited and penalized by the N.A.S.D. for violations, when all he did was follow S.E.C. releases and operate in accordance with sound business procedures. Does the N.A.S.D. have the authority to find parties guilty, when they are complying with the releases and advice of the S.E.C., a higher authority?

Joseph Buchman has established a justification for the firm's policy for failure to honor this transaction.

PAGE 7, Paragraph 1:

Sidney Buchman was definitely not involved in the decision to purchase Crystalography shares in the open market in June, 1973. Sidney Buchman was not aware, from at least May 18, 1973 of Shaskan's failure to accept delivery of the Crystalography shares. The trades were the results of our clearing the transactions of Pohs Levy & Co., . This was an operational

problem handled solely by Joseph Buchman, without consulting any other officer, as this was his duty at the firm.

When Joseph Buchman conversed with Sidney Buchman concerning the purchase of Crystalography, Joseph Buchman had already made the decision to buy the stock in the open market. Joseph Buchman's conversation with Sidney Buchman, was only to determine how was the best way to purchase the stock and what brokers to deal with. Joseph Buchman wanted to avail himself of Sidney Buchman's expertise in the Over-the-Counter Market, and not to help him make a decision already resolved. Sidney Buchman was the head of Shaskan's Over-the-Counter function, and it was his duty to handle the purchase of the Crystalography, nothing more and nothing less.

SUMMARY OF ARGUMENT

Based on the statement of facts presented, the following should be determined:

(1) Sidney Buchman should be exonerated from any torts alluded to in that he did not participate in ay decision to refuse, to accept, to deliver any Crystalography stock, was not involved in any manner in the decision to purchase Crystalography stock in the open market, and that he had no responsibility for the entire matter as it was solely an operational procedure.

(2) Joseph Buchman should be exculpated from any wrongdoings or violations of N.A.S.D. rules or regulations, in that he followed a proper, just, and equitable course of action in handling this matter and that he adhered to S.E.C. releases pertaining to this matter. As the N.A.S.D. stated, and as mentioned in the Statement Of Fact, no violations occurred prior to May 18, 1973. From May 18, 1973, Joseph Buchman acted orderly and swiftly in carrying out his duties as operational officer of Shaskan & Co., Inc.

CONCLUSION

For all of the foregoing reasons, the Court should set aside all the sanctions imposed by the N.A.S.D., and reduced by the S.E.C.

Respectfully submitted,

SIDNEY BUCHMAN & JOSEPH BUCHMAN

NEW YORK STOCK EXCHANGE, INC.
DEPARTMENT OF MEMBER FIRMS
23RD FLOOR
55 WATER STREET
NEW YORK, N. Y. 10041

RICHARD W. LEE
SUPERVISING COORDINATOR
(212) 623-2247

June 15, 1973

Shaskan & Co., Inc.
67 Broad Street
New York, New York 10004

Attention: Mr. Joseph Buchman

Gentlemen:

This is to confirm our meeting of June 8, 1973 in which you were directed to do the following:

1. Maintain a net capital of $200,000.
2. Effect prompt delivery of remaining inactive customer accounts.
3. Accomplish a prompt liquidation of proprietary securities in order to bring your ratio of non-exempt securities to excess net capital below 7.5 to 1.

Accordingly, you are to provide the Exchange no later than Tuesday, the 19th of June, 1973 with a status report as to the remaining customer accounts that have not yet been delivered out. In connection with the customer accounts, all are to be delivered out by June 22, 1973. In addition, you are to supply the Exchange with a schedule of the remaining proprietary positions in order to assure that the Exchange's directive concerning the maintenance of a non-exempt to excess net capital ratio of 7.5 or lower.

The corporation is also to provide assurances that its current net capital is above $200,000.

If you have any questions concerning these matters, you can contact me on 623-2247.

Very truly yours,

Richard W. Lee

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
REGIONAL OFFICE
26 FEDERAL PLAZA
NEW YORK, N.Y. 10007

IN REPLYING PLEASE QUOTE

NY-E:MNJ

June 22, 1973

Mr. Joseph Buchman
Vice President
Shaskan & Co., Inc.
67 Broad Street
New York, New York 10004

Dear Sir:

As was stated to you by staff members Thomas Dolan and Mark Jacobs at noon today, this office deems it inadvisable for your firm to satisfy customer free credit balances from the funds which are presently in the firm's cash reserve account. In the event that free credit balances exceed the sum presently on deposit in the cash reserve account, and only some of your customers are paid, such action would constitute a preference being given to certain customers. Therefore, we have suggested that you refrain from making any payments to customers until the staff has had an opportunity to review the firm's books and records, and on that basis, to determine the propriety of such action.

I further understand that you have agreed to the staff's suggestions as set forth above.

Very truly yours,

WILLIAM D. MORAN
Regional Administrator

by Thomas R. Beirne
Thomas R. Beirne
Chief Attorney, Br. #3